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No. 07-1607

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS OFFER NO LEGITIMATE BASIS FOR IMPOSING ARRANGER LIABILITY UPON SHELL

In their briefs, both the United States and California Respondents propose an unnatural reading of CERCLA that would extend liability for "arranging for disposal" of hazardous waste to a company that merely sold a useful product to a third party that spilled small quantities after obtaining ownership and control. Respondents distort the statutory text by rejecting any intent requirement and equating mere knowledge of a third-party's spills with arrangement for disposal. And they distort the record

by greatly exaggerating Shell's knowledge of spills and involvement in the unloading process. These assertions are in error and lend no support for the decision below.

A. Mere Knowledge Of Spills Is Insufficient To Trigger Arranger Liability

Respondents suggest that arranger liability may be premised on mere *knowledge* of leaks and spills by a third party at a contaminated site rather than *intent* to dispose of hazardous waste. *See* U.S. Br. 17-19; Cal. Br. 26-27. This suggestion contravenes the plain meaning of 42 U.S.C. § 9607(a)(3), for the terms "arrange for ... disposal" require intentional action to discard hazardous waste. *See* Shell Br. 18-21 (discussing dictionary and case law definitions); *see also Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (the phrase "arranged for" contains "critical words" that "imply intentional action").[1] Respondents offer four rationales for abandoning the well-accepted intent requirement, each of which is unavailing.

1. Respondents first cite CERCLA's definition of "disposal," which by cross-reference to 42 U.S.C. § 6903(3) includes what the United States labels the "unintentional acts of spilling and leaking." U.S. Br. 17; *see also* Cal. Br. 34. But the word "disposal" in 42

[1] Respondents attempt to distinguish *Amcast* on the ground that the manufacturer there did not exercise control over the deliveries "other than hiring the carrier...." U.S. Br. 25 n.9; *see also* Cal. Br. 31. But this case is indistinguishable since Shell likewise delivered its product by common carrier F.O.B. Destination. In any case, consistent with the language in § 9607(a)(3), denial of liability in *Amcast* turned on the seller's lack of intent to dispose of hazardous waste, not control over the delivery process.

U.S.C. § 9607(a)(3) may not be severed from the words "arranged for" that immediately precede it and that unmistakably convey purposeful action. *See* Shell Br. 18-19, 21; U.S. Br. 17 ("The dictionary defines 'arrange' as 'to prepare or plan.'").

Contrary to Respondents' suggestion, retaining an intent requirement for arranger liability would not read "spilling" and "leaking" out of the statute. Both 42 U.S.C. § 9607(a)(2) (operator liability) and § 9607(a)(4) (transporter liability) also use the term "disposal." As Judge Posner stated in *Amcast*, "the same word can mean different things in different sentences," and while "[i]n the context of the operator of a hazardous-waste dump, 'disposal' includes accidental spillage," it does not "in the context of the shipper who is arranging for the transportation of a product." 2 F.3d at 751.

2. The United States next suggests that any intent requirement is undermined by the terms "'by contract, agreement *or otherwise* arranged for.'" U.S. Br. 18. But the fact that that arrangement may be *informal* does not mean that it need not be purposeful, and nothing in this language supports arranger liability based on mere knowledge.

3. The United States cites an operator liability case, *United States v. Bestfoods*, 524 U.S. 51, 63 (1998), for the proposition that "common-law principles are to apply unless CERCLA 'speak[s] directly to the question.'" U.S. Br. 18. But nothing in *Bestfoods* suggested that common law principles apply in the face of clear statutory language. To the contrary, *Bestfoods* applied common law principles to decide whether the corporate veil could be pierced, *see* 524 U.S. at 62-63, a question to which CERCLA does not speak, but interpreted the term "operator" under 42

U.S.C. § 9607(a)(2), according to the "*plain language* of the statute," not the common law, *Bestfoods*, 524 U.S. at 65 (emphasis added). The United States' reliance on miscellaneous Restatement provisions to suggest that knowledge is sufficient for arranger liability (*see* U.S. Br. 18 (citing RESTATEMENT (2D) OF TORTS §§ 413, 416, 427, 427A, 427B)) is thus misplaced.

4. Finally, in an effort to justify its "knowledge" test, the United States incorrectly paraphrases the Eleventh Circuit's decision in *South Florida Water Management District v. Montalvo*, 84 F.3d 402 (11th Cir. 1996), as "noting [the] importance for Section 107(a)(3) purposes of [a] defendant's knowledge (or lack thereof) that hazardous substances would be spilled incident to pesticide spraying...." U.S. Br. 19 (citing *Montalvo*, 84 F.3d at 407-09). But the United States omits to note the Eleventh Circuit's further statements that "*ownership* of the hazardous substances, and *intent* are [also] relevant to determining whether there has been an 'arrangement' for disposal," *Montalvo*, 84 F.3d at 407 (emphasis added), and that arranger liability requires that a party take an "affirmative act to dispose of the wastes," *id.* *Montalvo* thus does not support Respondents' position.

B. Shell Lacked Knowledge of Hazardous Waste Disposal

Even if arranger liability could rest upon mere knowledge that a third party to whom one has sold a useful product was spilling that product so as to dispose of hazardous waste, the record here does not support Respondents' suggestions that Shell had such knowledge.

1. Respondents erroneously contend that surface leaks and spills were inherent or inevitable in the delivery process, so that knowledge of such spills may be conclusively imputed to Shell. *See* U.S. Br. 22; Cal. Br. 27-30. Such leaks and spills, however, were not inherent but were readily avoidable. As Respondents' key witnesses Jack Brown and Gary Leary admitted, bulk D-D could have been unloaded without any spillage if B&B had implemented certain methods, including catching drippage in a bucket, draining any excess product back into the tank, using a tank side pump, installing a concrete pad in the unloading area or using a dripless coupling. J.A. 224-27, 254-55, 257-61.[2]

Shell sought to ensure that B&B would take such precautions after acquiring D-D shipments by requiring in its shipping contracts that B&B "furnish and maintain facilities for receiving and storing all Products delivered which are safe, adequate, and in compliance with all applicable governmental requirements." J.A. 583. B&B's failure to employ such methods after it assumed ownership and control of the D-D does not make the spills and leaks an inherent or inevitable part of the process.[3]

[2] *See E S Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1487 (N.D. Ala. 1995) (finding knowledge of spills insufficient to impose arranger liability where the recipient could have prevented the spills "with reasonable care").

[3] California's reliance (Cal. Br. 27) on *Morton Int'l, Inc. v. A.E. Staley Manufacturing Co.*, 343 F.3d 669 (3d Cir. 2003), for the proposition that "general knowledge that waste disposal is an inherent or inevitable part of the process ... may suffice to establish liability," *id.* at 678, is thus beside the point.

2. To the extent Shell was aware of any spillage by B&B,[4] it had reasonable cause to believe that minor surface spills posed no environmental threat. In its normal agricultural usage, D-D is injected into the soil six to twelve inches below the surface, where it volatilizes or "fumes" throughout the soil to kill nematodes that attack crop roots. Pet.App. 83a-86a. Because D-D normally vaporizes when it is applied in the soil, small spills of D-D are unlikely to cause environmental contamination in themselves. Pet. App. 94a-98a. In the absence of added water, significant quantities of D-D (at least 500 gallons on bare soil or in excess of 10,000 gallons on intact asphalt) would need to be spilled before D-D "would reach groundwater in concentrations sufficient to require a remedial response." Pet.App. 95a. But rain is scarce in central California, and D-D "evaporates twice as fast as water." Pet.App. 96a.[5]

Thus it is not surprising that the EPA's own remedial investigation found no contamination at the tank

[4] The district court's finding in this regard was based on the testimony of Robert Swain (Pet.App. 120a), a Shell engineer who visited the Arvin site once in 1979 (Pet.App. 114a) and did not indicate that he observed spills and leaks of D-D while there. Pet.App. 114a, 120a. His testimony is thus speculation based on observations at other plants. *See* J.A. 58, 64.

[5] The district court rejected (Pet.App. 97a-98a) Respondents' claims that contamination occurred from focused infiltration as a result of "flaws and cracks in an oiled ground surface." Pet.App. 97a. With respect to Respondents' alternative theory that surface runoff of water containing dissolved chemicals may have migrated from the Railroad parcel to B&B's waste pond, the district court concluded that a "substantial dispute remains whether rainfall at Arvin is sufficient to generate the quantity of runoff that would have been necessary for such transport to occur." Pet.App. 98a.

area where the bulk unloading occurred. J.A. 602. And on the Railroad parcel, where *only* surface spills and leaks occurred, contamination levels were too low to require remediation. Pet.App. 93a. This lack of contamination confirms that there was no reason to assume that incidental surface spills and leaks alone posed any environmental threat.

3. The district court's findings further confirm Shell's lack of nexus with or advance knowledge of B&B's disposal of hazardous waste. The court found that Shell lacked "operational control over B&B's handling of D-D and other Shell chemicals at the site," Pet.App. 259a, and that B&B's own unsafe practices having nothing to do with Shell's deliveries were the predominant cause of the contamination. Pet.App. 250a. Those B&B practices included transferring D-D from bulk storage tanks to bobtails, rinsing bobtails, examining filters for nurse tanks and D-D rigs, and rinsing out nurse tanks into an unlined sump next to the pond. Pet.App. 250a, 257a-259a; *see also* Pet.App. 193a (finding that B&B, not Shell, supervised all "pollution causing activities").[6]

While California faults Shell for "chang[ing] the delivery process from sealed drums to bulk delivery," Cal. Br. 29, the district court found that "*B&B* ... chose to store Shell D-D in a bulk storage tank," "chose not to use teflon seals and special chemical

[6] The nexus between spillage of small quantities of D-D during transfer and site contamination is further weakened by evidence that the contamination resulted from B&B's use of an unlined sump connected to a pond to collect rinse-water that later penetrated groundwater tables. Pet.App. 100a-101a, 184a, 251a. The theory that rainwater washed the spills into the pond is dubious given the scarcity of rain in the California desert. Pet.App. 82a, 94a-98a, 254a.

hoses in the late 1960s," and "made an independent decision that most of its fertilizer [sic] rigs would be washed out on or adjacent to unprotected soil, and designed the Site drainage of the residue to wash downgradient into the Site's waste sump...." Pet.App. 194a (emphasis added). Moreover, the district court found that "B&B was responsible for the replacement of leaky sight gauges, hoses, and filters for each rig; and determined how and where to store chemicals and fertilizers." *Id.*

Thus, even if Respondents' allegations that Shell had knowledge of leaks and spills are accepted as true, such factors do not *ipso facto* prove that Shell knew that the transfer process would "directly result in disposal of ... hazardous substances ...." U.S. Br. 17 (emphasis removed).

4. Respondents further seek to find Shell a knowing participant in hazardous waste disposal based on Shell's attempts to encourage environmentally safe procedures, for example by requiring common carriers to use certain hoses, couplings and other equipment, U.S. Br. 21; Cal. Br. 29. Inferring arranger liability from such practices, however, would discourage regulatory compliance. *See Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1581 (S.D. Ga. 1992); *E S Robbins*, 912 F. Supp. at 1484, 1487. And contrary to the United States' suggestion (U.S. Br. 22 n.7), chemical manufacturers are more likely to reduce than increase safe handling advice to their purchasers if such instructions could be used as a basis for arranger liability even after the transfer of ownership.

5. Respondents' reliance on a purported "shrinkage allowance," U.S. Br. 22-23; Cal. Br. 30, to demonstrate Shell's supposed knowledge of hazardous

waste disposal is misplaced. Even assuming Shell reduced its prices to account for surface spillage, such a practice establishes at most only awareness of leakage not *disposal of hazardous waste*. In any case, Respondents mischaracterize the so-called "shrinkage" allowance. Shrinkage can occur as a result of temperature changes, among other factors. J.A. 498, 583. And the evidence showed that the purpose of these discounts was a discount pricing mechanism, not a lost product deduction. Pet.App. 119a-120a.

C. Sales of Useful Products Are Distinguished From Disposals of Hazardous Waste By Their Nature, Not Their Timing

Respondents attempt to limit the useful product defense to arranger liability (*see* Shell Br. 19) to cases where disposal occurs long after sale or use. *See* U.S. Br. 25 (conceding that "the causal link between a transaction and a subsequent disposal" may be "too attenuated to support arranger liability"); Cal. Br. 31 (conceding that a seller may not be liable where "there is ultimately a disposal after the product has served its useful purpose" or where "disposal ... occurs decades after sale of a useful product" or "after deterioration of the facility"). They offer no authority for imposing such a limitation on the useful product defense, nor do prior useful product decisions impose one, instead relying on the *nature* and *intent* rather than the timing of a transaction to distinguish useful product sales from waste disposals.

In *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999), for example, the purchaser of chemicals for its own use and for resale brought suit for contribution against the seller. The Second Circuit held that, "[b]ecause the definition of 'disposal' refers

to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal within the meaning of CERCLA." *Id.* at 164. The court did not base its holding on any "attenuated" causal link, but rather on the fact that the purchased chemicals were "virgin and not waste at the time that [it] purchased them," and that there was "no evidence in the record ... to support an inference that the transaction at issue was anything more than a sale." *Id.*

Likewise, in *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990), arranger liability was rejected where there was no evidence that the transaction was "anything more than a mere sale." And again, in *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998), denial of liability was not based on attenuated causation but on an examination of the "intent of both parties to the transaction," which demonstrated that "the removal of contaminants was not the purpose of the transaction."

Thus, the issue is not how long after the transaction a product becomes a waste, but who created the waste and effectuated the disposal. *See, e.g., Freeman*, 189 F.3d at 164. Respondents offer no reason why a seller of a useful product should be liable as an arranger merely because the purchaser spills it immediately after acquiring ownership and control. *See, e.g., Amcast*, 2 F.3d at 751 (holding that in arranging to deliver a chemical to a customer's storage tanks, a seller "did not arrange for spilling the stuff on the ground"); *E S Robbins*, 912 F. Supp. at 1487 (denying arranger liability where spill of hazardous substances occurred contemporaneously with delivery). Here, after Shell had delivered a

useful product, and B&B obtained ownership and control, B&B generated the waste through a process for which B&B was solely responsible. Pet.App. 193a; J.A. 583.

California cites *Catellus Development Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994), and *Courtaulds Aerospoace, Inc. v. Huffman*, 826 F. Supp. 345 (E.D. Cal. 1993), to support its claim that a defendant who "knowingly set into action a chain of circumstances that led directly to disposal as an inherent part of the transaction" is liable as an arranger. Cal. Br. 27. These cases, however, cannot be so construed. California ignores the crucial requirement in *Catellus* that the substance "ha[s] the characteristic of waste ..., *at the point at which it was delivered to another party*." 34 F.3d at 752 (emphasis added). The lead-containing battery casings in *Catellus* were clearly waste because there was no choice but to dispose of them. In contrast, the D-D was delivered as a new product that did not require disposal.

Likewise, *Courtaulds* involved the intentional separation of "valuable metal from unwanted insulation via incineration," 826 F.3d at 353, which created a waste byproduct, *see id.* at 347. Since the parties purposefully removed the unwanted waste byproduct, which led to the disposal of hazardous waste, liability was imposed. Each of these cases is a far cry from the useful product sales involved here.[7]

[7] Respondents further attempt to undermine the settled distinction between useful product sales and hazardous waste disposal by arguing that arranger liability extends to disposal of "hazardous *substances*," not "hazardous *waste*." *See* U.S. Br. 26; Cal. Br. 34-36. This unnatural reading of the statute is unavailing. "Congress could have defined 'disposal' for purposes of

D. Shell Lacked Even The Minimum Prerequisites of Ownership or Actual Control

Respondents deny that arranger liability requires ownership or actual control of hazardous wastes at the time of disposal, suggesting that such a requirement would encourage parties that arrange to dispose of drums of hazardous substances to "provide by contract for the immediate transfer of title to the [waste] hauler at the time of pickup." U.S. Br. 28. This suggestion is specious. In the United States' hypothetical the party would be entering the transaction with the *intent* of disposing of hazardous waste, and so arranger liability would be established without any need to consider ownership or actual control. But where, as here, there is no *intent* to dispose of hazardous waste, then at least a showing of ownership or control is necessary before "arrangement" to dispose of hazardous waste may be inferred. *See* Shell Br. 26-28 (discussing cases).[8]

CERCLA any way it chose; it chose to import the meaning provided in SWDA." *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1362 (9th Cir. 1990). And SWDA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any ... *hazardous waste* into or on any land." 42 U.S.C. § 6903(3) (emphasis added); *see id.* § 9601(29).

[8] These factors of ownership and control distinguish the so-called "formulator" cases. In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1979), for example, chemical manufacturers retained ownership of their products and "contracted for formulating services requiring the mixing of active and inactive chemicals *according to the manufacturers' specifications*," allowing an inference that "the manufacturers exercised some *control* over the formulator's mixing process." *Montalvo*, 84 F.3d at 408 (discussing *Aceto*) (emphasis added). Such factors are not present here.

Contrary to Respondents' suggestions, Shell lacked any such ownership or control over the D-D at the time it was unloaded. California erroneously asserts that "legal title of [D-D] did not pass automatically to [B&B] when the delivery truck entered the site." Cal Br. 29. To the contrary, the parties' contract mandated that the D-D be delivered "F.O.B. Destination," meaning that title, ownership and control passed to B&B when the common carrier arrived. *See* Pet.App. 85a, 193a; J.A. 264-65.[9] As Shell's sales manager William H. Haverland testified, Shell intended "F.O.B Destination" to mean that, "when it leaves the highway and it turns into your driveway, it's your product.'" Pet.App. 214a.[10]

Finally, Respondents, like the court of appeals, seek to cobble a miscellaneous assortment of facts to conclude that Shell had knowledge and control of B&B's disposal of D-D. Shell lacked such knowledge for the reasons discussed above in Part I.B. And nothing in Respondents' list of supposed "control" factors (*see* U.S. Br. 20-22) can overcome the district court's clear findings that "Shell did *not* participate in the day-to-day operations of the Arvin facility," "did *not* hire or supervise B&B's employees involved

[9] While common carriers may at times have assisted in the unloading, they did so only at B&B's request and direction. Pet.App. 193a. B&B was legally responsible because it was required to unload each delivery at its "own risk and expense." J.A. 583.

[10] Such transfer of ownership is not altered by Shell's ability to void the transaction if B&B did not have adequate safeguards, as Respondents suggest. It is axiomatic that the delivery of goods constitutes a transfer of ownership unless the parties' agreement clearly states otherwise. *See* U.C.C. § 2-401(2) (2004). Transfer of legal title would be blocked only if Shell *voided* the contract—not when it *enforced* it.

in pollution causing activities," "did *not* ... exercise direction over the facility's storage and sales activities," and "did *not* ... *assume actual control* of the [delivery and unloading] processes." Pet.App. 193a (emphasis added).

In sum, Respondents cannot justify the Ninth Circuit's imposition of arranger liability on a company that sold a useful product by common carrier for commercial use, that never intended to dispose of hazardous waste, and that had no knowledge of, involvement in, or control over, the negligent practices of a third-party purchaser that caused the disposal of hazardous waste. The decision below as to arranger liability should be reversed.

II. RESPONDENTS CANNOT SHOW THAT THE DISTRICT COURT'S METICULOUS APPORTIONMENT ANALYSIS IS UNREASONABLE UNDER THE RESTATEMENT

Respondents do not dispute that Congress rejected mandatory joint and several liability under CERCLA in favor of the common law approach set forth in the Restatement (Second) of Torts, which provides for apportionment of liability where a reasonable basis exists for doing so. *See* RESTATEMENT (2D) TORTS § 433A. Nor do Respondents disagree, at least in theory, that that standard permits courts to apportion liability based on practical approximations or estimates. *See, e.g., United States v. Township of Brighton*, 153 F.3d 307, 320 (6th Cir. 1998) (there need only be a "*reasonably ascertainable*" basis for apportionment) (emphasis added); *Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1997) ("The evidence need only be sufficient to permit a

rough practical apportionment.") (emphasis added); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904 n.19 (5th Cir. 1993) ("[A] *rough approximation* is all that is required under the Restatement.") (emphasis added). The Restatement and early common law decisions are replete with examples of apportionment in the absence of precise calculations regarding each party's share of the harm. *See, e.g.*, RESTATEMENT (2D) TORTS § 433A cmt. c, d, illus. 5; *id.* § 881 cmt c, illus. 1, 2; Br. of *Amicus Curiae* Ass'n of Am. R.R. 5-10 (citing cases).[11]

Respondents instead pick apart the district court's factual findings on apportionment, paying lip service to the Restatement but in fact requiring a level of precision that is as a practical matter well beyond the Restatement's standard. The district court's finding that Shell's share of the liability was 6% resulted from a comprehensive analysis of the testimony and evidence in the record, and represents at least a rough approximation of Shell's minimal responsibility for the contamination. If anything, this figure which the district court described as Shell's "maximum contribution" (Pet.App. 241a) overstates Shell's responsibility for the harm, as the district court consistently used conservative calculations and assumptions. Respondents' arguments in support of

[11] The United States notes, but does not ask this Court to follow, two decisions that it contends "sugges[t] that ... the burden of proving divisibility in CERCLA cases should be more demanding than under general Restatement principles." U.S. Br. 35 n.16. Neither *United States v. Hercules, Inc.*, 247 F.3d 706, 715-17 (8th Cir. 2001), nor *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008), however, deviates from the reasonable basis standard that has been applied uniformly in CERCLA cases since *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

the Ninth Circuit's decision to impose 100% joint and several liability should be rejected.

A. Respondents Fail to Show Legal Error in the District Court's Apportionment Analysis

Twisting the district court's analysis nearly beyond recognition, Respondents argue that the district court committed four legal errors in concluding that there was a reasonable basis to apportion liability. None of these arguments, however, reveals a legal error in the district court's apportionment analysis.

1. Respondents first contend that the district court erred by reviewing the record itself to determine if there was a reasonable basis for apportionment when Shell pressed the argument that it had no liability at all. U.S. Br. 37-38, 41; Cal. Br. 57-58 & n.9. Contrary to Respondents' contention, however, the district court's "independent" review of the evidence in the record did not somehow "absolv[e] [Shell] of [its] burden" to establish an evidentiary basis for apportionment. U.S. Br. 15. No principle precludes a fact-finder, faced with what it perceives to be unhelpful *arguments* regarding apportionment, from reviewing the record to determine whether there exists a reasonable basis upon which it could apportion liability nonetheless. "The fact that apportionment may be difficult ... or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability." *Bell Petroleum*, 3 F.3d at 903; *see also* Br. of *Amicus Curiae* Ass'n of Am. R.R. 7 & n.3 (citing common law cases).

Moreover, as California recognizes, "[t]he sole question" before the district court was "*whether there was*

evidence in the record sufficient to show that the harm was divisible based on a 'reasonable and rational basis.'" Cal. Br. 54 (emphasis added). And that is exactly the question the district court answered. Far from encountering a record with "an absence of evidence and argument directed at the question of apportionment," U.S. Br. 39, or a situation where there was a failure "to offer any pertinent evidence or argument," U.S. Br. 41, the district court reviewed a record with substantial evidence and testimony adduced by the parties regarding the volume of D-D spilled during the bulk transfer process and at other times. *See, e.g.*, Pet.App. 255a-260a; J.A. 125, 132, 208, 230, 267.[12]

While Shell primarily argued that it was not an "operator" or an "arranger," it also undertook considerable effort and presented evidence to show that its divisible share, if derived from spills at the time of bulk unloading, was so minimal and so disconnected from the cause of the actual contamination (the pond) as to justify an apportionment of zero or nearly so. *See, e.g.*, Shell's Proposed FOF ¶¶ 31-36 (Dkt. No. 1317). In doing so, Shell acknowledged that if the district court "believes [Shell is] liable, then obviously we need to consider divisibility," 9/28/99 Tr. 104 (Dkt. No. 1330), and it specifically argued in the alternative that "[d]ivisibility is ... supported on a volumetric basis." *Id.* at 107; *see also* Shell's Proposed COL ¶¶ 47-50 (Dkt. No. 1318).

[12] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003), *cited in* U.S. Br. 38 n.17, is thus inapposite, as there defendants presented *no* evidence that would provide a basis for apportionment. *See* 315 F.3d at 186-87.

Thus, Respondents cannot credibly contend that Shell waived its right to apportionment an argument that both the district court and the Ninth Circuit rejected. U.S. E.R. 488; Pet.App. 12a n.16.[13]

2. The United States next contends that the district court impermissibly faulted *Respondents* for "the absence of evidence and argument directed at the question of apportionment." U.S. Br. 39. The district court, however, imposed no such evidentiary burden on Respondents, but merely reviewed the evidence in the record to determine whether a reasonable basis for divisibility existed. Pet.App. 255a-260a. Had that evidence not so preponderated, the court would have imposed joint and several liability. Pet.App. 238a.

3. Nor is the United States correct in contending that the district court erred by treating B&B's insolvency as favoring apportionment. U.S. Br. 39. Comment h to Restatement (Second) of Torts § 433A, upon which the United States relies, provides that in "exceptional cases ... in which injustice to the plaintiff may result from" apportionment, such as where one tortfeasor is hopelessly insolvent, a court "may ... refuse" to apportion liability even where there is a reasonable basis for doing so.

[13] The United States' reliance (U.S. Br. 41) on *Burdett v. Miller*, 957 F.2d 1375 (7th Cir. 1992), is misplaced, as there the district court changed plaintiff's theory of a RICO enterprise when it announced its findings of fact and conclusions of law, having not given any indication during trial or post-trial proceedings that it was considering doing so. *Id.* at 1380. Here, in contrast, Respondents well knew that divisibility would be an issue, *see, e.g.*, Pet.App. 12a n.16, and they had the opportunity to contest the district court's apportionment findings, *see* Mem. in Support of Govts.' Motion To Amend Court's FOF & COL (Dkt. No. 1382).

But there is no basis upon which to conclude that apportionment would cause any such injustice here. Comment h "will rarely be appropriate or necessary in CERCLA cases, especially when the government is the plaintiff," because "[u]nder CERCLA's strict liability scheme the deck of legal cards is heavily stacked in favor of the government." *Bell Petroleum*, 3 F.3d at 902 n.13; *see also Hercules*, 247 F.3d at 719 n.10 (8th Cir. 2001) ("reject[ing] any suggestion that the financial condition of the parties should play a role in a CERCLA divisibility analysis"). This is even more so given that Respondents established funding mechanisms for the specific purpose of paying for orphan shares. *See* 42 U.S.C. § 9611; Cal. Health & Safety Code §§ 25300-25395.45.

In any event, the district court expressly considered comment h and recognized that it could "decline to apportion an indivisible harm as a matter of discretion in exceptional cases," Pet.App. 243a, but chose not to do so because it concluded that the equities did not favor invoking this *exception* to apportionment, Pet.App. 248a. The court acted well within its discretion.

4. Finally, Respondents contend that the district court conflated apportionment in a cost recovery action under Section 107(a)(4)(A) with a contribution action under Section 113(f), improperly relying on equitable considerations when calculating the proportion of Shell's liability. U.S. Br. 40; Cal. Br. 58-59. The district court, however, did no such thing. Instead, the district court engaged in two separate analyses, emphasizing that "'[i]t is critical that these two different contexts are not confused.'" Pet.App. 235a (quoting *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987)).

First, the district court stated the Restatement standard for apportionment in a cost-recovery action under Section 107(a), Pet.App. 234a-241a, and then applied it to B&B, Pet.App. 243a-248a, the Railroads, Pet.App. 248a-255a, and, finally, Shell, Pet.App. 255a-260a. This analysis did not rely on equitable considerations.

Second, in response to Shell's and the Railroads' request for "a determination of their allocable shares of past and future liability, if any, pursuant to 42 U.S.C. § 9613(f)," U.S. E.R. 90, the district court separately stated the equitable considerations relevant to a Section 113(f)(1) contribution action, Pet.App. 241a-243a, and then concluded that equity *did not* support reducing Shell's 6% share, Pet.App. 260a-263a. Thus, to the extent that the district court relied on equity, it did not affect Shell's apportioned share.

In sum, Respondents identify no legal error in the district court's apportionment analysis that justifies the Ninth Circuit's imposition of joint and several liability.

B. Respondents Hold The District Court's Factual Findings To An Improper Standard of Precision

Respondents assail the district court's factual findings on apportionment as supposedly lacking a reasonable basis, contending that they are based on "unsubstantiated assumptions," "gross approximations," and its "best guess." U.S. Br. 42; Cal. Br. 54. Respondents would impose evidentiary requirements well in excess of the Restatement standard. Contrary to Respondents' arguments, the district court's comprehensive analysis of the record yielded a reason-

able, and indeed conservative, approximation of Shell's liability that the court of appeals should not have second-guessed.

1. The United States first relies on Comment i to Restatement (Second) Torts § 433A, which counsels against apportionment "where either cause would have been sufficient in itself to bring about the result." U.S. Br. 43-44. But there is no reason to believe that, here, "the conduct of [Shell] and the conduct of [the Railroads] would each be a sufficient but not a necessary condition of the clean up." *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 958 (7th Cir. 1999), *cited in* U.S. Br. 43-44 n.21.[14] Without citation to any evidence, the United States asserts contrary to the decision below, Pet.App. 29a-30a that "the threat to drinking water *presumably* would exist even if the plume contained only the hazardous substances traceable to Shell's spillage ...." U.S. Br. 43 (emphasis added). But that is a baseless presumption, considering that Shell was deemed responsible for only one of the substances found in the plume (D-D), Pet.App. 256a, 260a, and, with respect to that substance, was deemed responsi-

[14] In *Browning-Ferris*, the Seventh Circuit expressly refused to hold the company liable for 100% of the recovery costs in an equitable apportionment under Section 113(f)(1) because its "pollution was not, so far as appears, so serious all by itself as to have required the incurring of *all* the clean-up costs that were incurred." 195 F.3d at 958. Here, in contrast, Respondents still seek to hold Shell 100% jointly and severally liable despite the absence of any evidence that the spillage of D-D during bulk unloading would have required incurring all of the clean-up costs, and, as the United States candidly acknowledges, "the availability of a Section 113(f)(1) contribution action may be of little practical benefit to [Shell and the Railroads] here in light of B&B's insolvency." U.S. Br. 34.

ble for only one of the numerous activities that the district court concluded resulted in the contamination, Pet.App. 259a.

2. The United States next contends that there is no reasonable basis to conclude that Shell's share of the harm is proportional to its volumetric contribution to the contamination because it is impossible to disaggregate the precise harm caused by each of several causal factors. U.S. Br. 43-44. Respondents imply that a district court faced with pollution of a stream from two factories would have to consider the relative toxic attributes of each pollutant, the chemical interaction between those substances, and the relative contamination caused by each pollutant, before deciding whether and, to what extent, to apportion liability. The Restatement, however, nowhere requires such complex calculations of relative toxicity and synergistic effects of each pollutant when apportioning divisible harms. To the contrary, it permits apportionment of harms caused by pollution solely on a volumetric basis:

> [A]pportionment is commonly made in cases of private nuisance, where the *pollution of a stream*, or flooding, or smoke or dust or noise, *from different sources*, has interfered with the plaintiff's use or enjoyment of his land. Thus *where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.*

RESTATEMENT (2D) TORTS § 433A cmt. d (emphasis added); *see also* Br. of *Amicus Curiae* Am. Ass'n of

R.R. 9-10 (citing commentary and cases). As Judge Bea explained in his dissent from the denial of rehearing *en banc*, "The whole point of Restatement § 433A is that no *specific* evidence is required for apportionment so long as the evidence and method used are 'reasonable.'" Pet.App. 65a.

Respondents' narrow construction of the Restatement's cattle illustration is likewise unpersuasive. U.S. Br. 45 n.22; Cal. Br. 57 n.10. Consistent with its recognition that apportionment among polluting factories is appropriate without determining the precise toxicity of each factory's pollution, the Restatement also permits apportionment based on the number of trespassing cattle a person owns without regard to whether "one owner's cattle might have more heavy-footed bulls, and less lightfooted heifers," Pet.App. 64a (Bea, J., dissenting from denial of rehearing *en banc*).[15]

In any event, this is not a case involving synergistic effects, as the EPA has used a single remedial process to treat each of the substances in the plume. *See* Pet.App. 147a-148a; J.A. 288-89. Indeed, while the district court derived its 6% figure from the

[15] The district court's apportionment analysis is hardly akin to California's example regarding cows, pigs, and sheep. Cal. Br. 57 n.10. In apportioning Shell's liability, the district court addressed a single contaminant—D-D—and calculated the amount of spillage based on eyewitness testimony and reasonable assumptions draw from that testimony.

Similarly, while the United States correctly states (U.S. Br. 45 n.22) that the Fifth Circuit's decision in *Bell Petroleum* involved volumetric apportionment of a single hazardous substance released by successive owners, 3 F.3d at 903, that fact does nothing to limit the court's conclusion that "evidence sufficient to permit a rough approximation is all that is required under the Restatement," *id.* at 904 n.19 (emphasis added).

portion of *D-D* for which it held Shell responsible, Pet.App. 255a-260a, it applied that figure to "the total site recovery costs," Pet.App. 260a, thus, in effect, requiring Shell to pay for any possible synergistic effect between the contaminants. Respondents' concerns are therefore misplaced.

3. Respondents likewise criticize the district court's calculation of Shell's volumetric contribution to the harm, but in so doing would impose stringent evidentiary requirements well in excess of the Restatement's reasonable basis standard. U.S. Br. 50-52; Cal. Br. 54-57. The district court's findings are in fact reasonable, and, if anything, Respondents' arguments show that Shell's 6% share is highly conservative.[16]

First, without relying on any authority, the United States contends that eyewitness testimony as to the amount of spillage cannot provide a reasonable basis for apportioning liability. U.S. Br. 50. It is, however, traditionally the fact-finder's role to assess the credibility and reliability of eyewitness testimony, and Respondents point to nothing in the Restatement standard that would alter this traditional role. Similarly, California points to no authority requiring expert testimony in support of apportionment. Cal. Br. 55-57.

Second, Respondents are incorrect to the extent they contend, again without citing any authority, that a CERCLA defendant must produce records

[16] Shell does not contend that a party may stipulate to a percentage share of the liability. U.S. Br. 42. As discussed, the district court had a reasonable basis for apportioning liability based on the evidence in the record, and it would be perverse to hold that the district court's conservative assumptions justify increasing Shell's liability from 6% to 100%.

documenting the amount of chemicals it sold each year to the disposing party as a prerequisite to apportionment. U.S. Br. 51; Cal Br. 53 n.7. The illustrations in the Restatement make clear that a reasonable basis for apportionment does not depend on documentary evidence. *See, e.g.*, RESTATEMENT (2D) TORTS § 433A cmt. d; *see also* RESTATEMENT (3D) TORTS § 26 cmt. h (stating that courts often "rela[x] the quality and quantity of evidence required to meet the burden of proof" when apportioning liability). In any event, the district court's finding as to the amount of D-D Shell sold to B&B is consistent with both eyewitness testimony (J.A. 230) and documentary evidence (*see* Shell Br. 45 n.18).

Third, contrary to the United States' contention (U.S. Br. 51), the district court calculated at least a "rough approximation" of D-D spills for which Shell was not held responsible based on unrebutted testimony and reasonable inferences. *See* Shell Br. 46-48 (citing Pet.App. 257a-259a). And even if California's unsupported assertion (Cal. Br. 55) that the district court did not consider all of B&B's spills of D-D had any basis in the record, that merely means the district court's 6% calculation *overstates* Shell's actual contribution to the harm—hardly a reason to make Shell *100%* jointly and severally liable.

Fourth, contrary to Respondents' assertions (U.S. Br. 51-52, Cal. Br. 55), the Restatement standard does not require that the district court determine the precise percentage of time that B&B washed the bobtails. *See, e.g., Bell Petroleum*, 3 F.3d at 904 (stating that if "assumptions are well-founded and reasonable, and not inconsistent with the facts as established by other competent evidence, they may be sufficiently reliable to support a conclusion that a

reasonable basis for apportionment exists"). Even if the district court overestimated the number of washings (and therefore the amount of D-D that B&B spilled), its calculation of Shell's liability would still provide the requisite "rough approximation" because a reduced percentage of bobtail washings would have a negligible effect on Shell's liability.[17]

In sum, while the district court's calculations were necessarily approximations extremely conservative ones—they fall well within the Restatement's liberal evidentiary requirements.

4. Finally, the United States faults the district court for assuming that each D-D spill led to the same amount of contamination in the subsurface. U.S. Br. 52. But since the Restatement permits courts to treat *different* pollutants similarly for purposes of apportionment, *see supra* at 22-23, it cannot bar a court from treating spills of the *same* pollutant

[17] For example, if B&B had washed the bobtails only half as often as the district court concluded, the spillage attributable to these washings would drop, on a yearly basis, from 205 gallons to 102.5 gallons. *See* Pet.App. 258a. Shell's share of the liability, however, would remain close to 6% (increasing only slightly from 5.97% to 6.46%).

Similarly, if, as California contends (Cal. Br. 55), the district court's calculation of the spills during transfer from the storage tanks to the bobtails is faulty, its calculation worked to understate those spills and thus *overstate Shell's apportioned liability*. This is so because the district court found that *three cups* of D-D spilled during pumping from the bulk storage tanks to the bobtail trucks, but, based on eyewitness testimony, that *three gallons* spilled when the D-D was pumped from the common carrier trucks to the bulk storage tanks. Pet.App. 257a. If anything, one would expect transfers from a truck to a tank to result in comparable amounts of spillage. Again, California's argument does not provide a basis for rejecting apportionment in favor of 100% joint and several liability.

similarly by assuming that each spill led to a similar amount of contamination.

The district court's decision here to apportion liability without considering the "porosity of the spill site and timing [of spills] in relation to rainfall or other water events" (U.S. Br. 52) is particularly unassailable. As to the former, given the fact that EPA found no contamination at the site of the bulk unloading, J.A. 602, and that liability turned on D-D reaching the pond through runoff, Pet.App. 97a-101a, 251a, it is difficult to conceive how the district court's failure to consider the spill site's porosity could have understated Shell's liability. As to the latter, Respondents seek to require Shell to undertake an impracticable, if not impossible, task: cross-referencing rainfall with the exact dates of spills over twenty-three years; the Restatement does not require such a Herculean effort.[18]

But even if the district court should not have assumed that each D-D spill led to the same amount of contamination in the subsurface, that assumption again operated to *overstate* Shell's responsibility because the district court concluded that every drop of spilled D-D reached the groundwater without differentiating between the spills during bulk unloading and, for example, the D-D that B&B washed into the sump. Pet.App. 254a-260a. The district court did so notwithstanding that the bulk unloading occurred 230 feet from the pond, J.A. 282, that the Arvin site lacked the substantial rainfall necessary to transport

[18] The record, however, does indicate yet again the tenuous nature of Respondents' causation theory, as their own expert placed the likelihood of rainfall sufficient, on any given day, to cause surface runoff at approximately 7%. J.A. 179. A defense expert placed the likelihood at 2%. J.A. 278.

the D-D that distance, Pet.App. 82a, 94a-98a, 100a-102a; J.A. 280-82, and that it had found that the D-D spilled onto the ground would "rapidly vaporize" but that the D-D rinsed into the sump would not. Pet.App. 101a. The United States' contention (U.S. Br. 52) that the district court did not account for the lining of the sump in 1979 therefore is not significant.

Thus, if anything, the district court gave a highly conservative estimate of Shell's liability about which Respondents have no cause to complain.

CONCLUSION

The judgment of the court of appeals should be reversed in its entirety.

Respectfully submitted,

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